IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Livramento v. Millennium Powder Coating Ltd.,*** 2007 BCSC 1282

Date: 20070824
Docket: L033228
Registry: Vancouver

Between:

Pedro Livramento

Petitioner

And

Millennium Powder Coating Ltd. and Severino Andre Livramento

Respondents

\- and -

Docket: L040233
Registry: Vancouver

Between:

Severino Andre Livramento

Petitioner

And

Pedro Livramento

Respondent

Before: The Honourable Mr. Justice Bauman

Reasons for Judgment

Counsel for Pedro Livramento	M. L. Ellis and L. A. Brunanski
Counsel for Millennium Powder Coating Ltd. and Severino Andre Livramento	G. C. Baldwin
Date and Place of Trial/Hearing:	12 - 16 February 2007 Vancouver, B.C.

I

[1] In these proceedings the two shareholders in a small company called Millennium Powder Coating Ltd. ("Millennium") pursue competing remedies under the ***Business Corporations Act***, S.B.C. 2002, c. 57 (the "***BCA***").

[2] Pedro and Severino Livramento are cousins. Together, they incorporated Millennium to conduct a powder coating business which involves the application of paint onto various steel and aluminium products.

[3] The cousins have had a falling out and their business relationship has irretrievably broken down.

[4] The competing petitions herein have been tried together as actions pursuant to the order of Justice Satanove made on 10 April 2006.

[5] I will refer to Pedro Livramento as the plaintiff, and to Severino Andre Livramento as the defendant.

[6] In his action, Pedro Livramento seeks an order winding up Millennium under (now) s. 324 of the ***BCA***.

[7] Pedro Livramento also asks for an order requiring Severino Livramento to account "for all monies drawn from (Millennium), to his credit and the credit of unauthorized bank accounts.

[8] In his action, Severino Livramento seeks an order entitling him to purchase Pedro Livramento's shares in Millennium. Severino Livramento's petition seeking

that relief is grounded on the seemingly wholly inconsistent premise that Pedro Livramento is not, and apparently has never been, beneficially at least, a shareholder in Millennium.

[9] The relief sought by Pedro Livramento in final submissions is similarly marked by some inconsistency in direction.

II

[10] As I have said, the Livramentos are cousins. They both emigrated from the Cape Verde Islands.

[11] Severino Livramento is the older of the two and he was more established in the community when Pedro Livramento approached him with the business proposal in 1999.

[12] Pedro Livramento had been involved in the powder coating business for some time with a North Vancouver firm. On his evidence, he approached his cousin in mid 1999 with a view to setting up a powder coating business. Pedro Livramento says that by the summer of that year, he and Severino Livramento had "agreed to go into business".

[13] Millennium was incorporated on 1 October 1999 with Severino Livramento as the sole subscriber and first director. By consent resolutions made that day, Severino Livramento was issued 100 Class A Voting Common Shares; so too was Pedro Livramento.

[14] The shares were allotted at the price of $1.00 each and I find as a fact that each man paid for his shares.

[15] Severino Livramento was appointed president, Pedro Livramento was appointed secretary.

[16] I digress to note again the central premise to Severino Livramento's petition. It is stated so in two paragraphs to his petition:

> 4. I deny that the Respondent is a shareholder. The Respondent never paid for his shares and has never contributed the cash investment he agreed to contribute to the company.
>
> …
>
> 9. I state that we never agreed to work as equal partners. What we agreed to was that we would each contribute $37,000.00 and in addition, I would contribute $100,000.00 by securing a line of credit with my family's residence. Subsequently I had to borrow another $15,500.00 from Scotia Bank which was used as an operating facility for the company. The Respondent never did contribute his $37,000.00. He paid $27,050.00. It was agreed at the outset that I would manage the company.

[17] The evidence at trial simply does not support the thrust of these statements.

[18] The plaintiff did pay the allotment price for his shares and did contribute a substantial sum by way of shareholder loans (at least $34,090.76 on Severino Livramento's own evidence at trial).

[19] The plaintiff also contributed his expertise in the business, his initial management of the staff and many of the early substantial customers of the operation.

[20] On the whole of the evidence, I conclude that the shareholdings allotted to the two men very much reflected their initial intention to operate the business like a quasi-partnership. (This is expressly confirmed by the defendant on his discovery read in at trial, questions 212, 349 and 373.)

[21] I will, as I proceed in the chronology, highlight the evidence which supports this conclusion.

[22] In October 1999, Pedro and Severino Livramento engaged a realtor for the purpose of acquiring business premises.

[23] Meharam Sugrim, the realtor, testified that both men worked with him in searching for a suitable property.

[24] On 15 October 1999, Millennium purchased a property on Douglas Road in Burnaby (the "Property") and both Pedro and Severino Livramento signed the statement of adjustments.

[25] The purchase price was $190,000. The deposit of $15,000 was advanced by Pedro Livramento; $114,000 of the purchase price was obtained through mortgage proceeds and the balance of some $66,000 was advanced by a draw on the line of credit secured on the home of Severino Livramento.

[26] In January 2000, the two men ordered the oven and dip tanks required in the business. Again, the evidence at trial supports the conclusion that Pedro Livramento was instrumental in directing the orders for this work (Exhibit 3, Tab 7) and in advancing funds towards the purchase price.

[27] The operation began in the spring of 2000. Pedro Livramento's involvement as a principal employee lasted until mid September 2002.

[28] Based on his evidence and that of company employees, Koko Tin and Vigilio Monteiro, it is clear that Pedro Livramento was the principal manager of the operation during this period.

[29] It is also clear that he devoted a substantial number of hours working at the business — substantially more than Severino Livramento. Much time at trial was expended exploring the number of hours each man devoted to the business. I need not resolve this issue with precision as it is irrelevant to the resolution of the case.

[30] Suffice to say that in these initial years, Pedro Livramento's contribution of so-called "sweat equity" to the business made up for Severino Livramento's larger capital contribution by way, in part, of the letter of credit on his home (which in any event has been totally repaid by the company).

[31] The unaudited financial statements of Millennium for years since its incorporation were exhibited at trial.

[32] In its first year of operation (ending 31 May 2001) the company posted retained earnings of $71,849 on sales of $318,005.

[33] In its second year, sales increased to over $400,000 and the retained earnings were recorded at just over $174,000.

[34] During these years, however, the relationship between Pedro and Severino Livramento deteriorated.

[35] Much of the disagreement between the men centred on Pedro Livramento's demand to be paid more by way of salary. Pedro Livramento was also, I find, very confrontational with his cousin and given to somewhat violent (or at least energetic) outbursts in the workplace.

[36] Severino Livramento was not much better and a number of highly charged incidents between the two men were described at trial by employees of Millennium.

[37] By way of ordinary resolution of the company, Severino Livramento, as president and director, unilaterally removed Pedro Livramento (without notice) as a signing officer of the company and its secretary in November 2001.

[38] Matters came to a final head in mid September 2002. Severino Livramento in writing dismissed Pedro Livramento from employment in the company. The police were called and Pedro Livramento left the premises.

[39] Pedro Livramento started up his own powder coating business and he remains engaged in that to this date.

[40] Severino Livramento has continued the business of Millennium.

[41] He has done so without consulting the plaintiff, without holding any annual general meetings and without disclosure of financial information to the plaintiff.

[42] According to the unaudited financial statements of Millennium, sales dropped significantly in fiscal 2003, 2004 and 2005 to the mid $200,000 range, rising slightly to approximately $285,000 in fiscal 2006.

[43] Retained earnings in the last fiscal year have not changed much from fiscal year 2002.

[44] The defendant has received wages from Millennium since 2002. The plaintiff complains that he has also enjoyed the use of a company paid vehicle, management bonuses and the advance of $30,000 for his legal fees in these proceedings. The plaintiff in turn has apparently received, in some manner, some company funds towards his legal fees.

[45] That somewhat brief overview of the facts will suffice for the disposition I propose to make at this time.

III

[46] I indicated above that the plaintiff has been somewhat inconsistent in the relief sought at trial.

[47] In his opening, counsel for Pedro Livramento, sought:

> (i) a declaration pursuant to s. 227(2) of the Act that the affairs of the Defendant Company, through its director Severino Livramento are being conducted in a manner oppressive and unfairly prejudicial to the plaintiff, Pedro Livramento;
>
> (ii) an order of the Court under s. 324(3)(b) of the Act that it would be just and equitable to grant an oppression remedy under s. 227(3) of the BCA;

> (iii) an order directing the Defendant Severino [to] transfer fifty percent interest or an aliquot portion thereof of all the shareholding interests to the Plaintiff;
>
> (iv) alternatively, an order directing that the Defendant Severino holds and possesses in trust, for the benefit of the Plaintiff, an undivided one-half interest in and to all corporate interests or an aliquot portion thereof in trust for the Plaintiff;
>
> (v) an order that he forthwith pay and transfer to the Plaintiff the plaintiff's shareholders loan in the amount of $26,900;
>
> (vi) alternatively an order directing that all shares of the Defendant Severino be transferred by the Defendant Severino to the Plaintiff absolutely;

[48] In closing submissions at the outset thereof, plaintiff's counsel indicated that the plaintiff sought a winding up order and an audit of the company's affairs.

[49] As well, the plaintiff advanced these claims:

> 7. The plaintiff also seeks a remedy under either ss.227 or 325 of the Act to compensate the plaintiff for his significant unpaid shareholder contributions to the defendant Company's retained earnings before he was summarily terminated and excluded from the management of the defendant Company's affairs in September 2002. For example:
>
> > a. In the nineteen months between May 2000 and December 2001, the plaintiff logged approximately 6120 *unpaid* hours (an average of approximately 330 hours per month) working as a powder coater and managing partner of the defendant Company before he was terminated and excluded from management.
> >
> > b. The plaintiff's unpaid work in this period significantly contributed to the company's retained earnings of $174,049 by the defendant Company's fiscal year end, May 31, 2002.
>
> 8. The plaintiff also seeks remedies for the negative impact of the defendant Severino's oppressive conduct in the four and a half (4 1/2) years since September 2002 when he took over all

> management functions of the company. In this period, the defendant Company has not earned a single penny of retained earnings according to un-audited financial statements produced by the defendants in these proceedings:
>
> …

[50] At the conclusion of his closing submissions, the plaintiff sought a winding up order or in the alternative:

> a. an order of the Court under s.324(3)(b) of the Act that it would be just and equitable to grant an oppression remedy under s.227(3) of the Act;
>
> b. a declaration pursuant to s.227(2) of the Act that the affairs of the defendant Company, through its director, the defendant Severino are being conducted in a manner oppressive and unfairly prejudicial to the plaintiff;
>
> c. an order requiring an the company an audit [*sic*] of all the company's financial records since September 2002, pursuant to s.204(5) to be paid for by the defendant Company;
>
> d. an order requiring the defendant Severino to offer his shares for sale to the plaintiff at a price the defendant Severino is willing to accept for those shares and if the plaintiff fails to purchase those shares within 21 days, then the defendant Severino shall be required to purchase the plaintiff's shares at the same price.

[51] This latter order is similar to that made in ***Safarik v. Ocean Fisheries Ltd.*** (1996), 67 A.C.W.S. (3d) 916 (C.A.).

[52] For his part, the defendant seeks an order that the defendant be permitted to buy the plaintiff's shares for the amount of the latter's investment in Millennium, which the defendant puts at $34,090.76.

IV

[53] The law on the remedies afforded by ss. 227 and 324 of the ***BCA*** has been discussed and summarized at length by Justice Southin in ***Safarik v. Ocean Fisheries Ltd.*** (1995), 12 B.C.L.R. (3d) 342 (C.A.), by Justice Lowry (then of this court) in ***Urquhart v. Technovision Systems Inc., et al.***, 2002 BCSC 172, by Justice Romilly in ***Paley v. Leduc***, 2002 BCSC 1757 and by Justice D. M. Smith in ***Walker v. Betts***, 2006 BCSC 128, in particular at ¶ 76-90 thereof.

[54] I reproduce ¶ 89 and 90 of Justice Smith's judgment in ***Walker v. Betts***:

> [89] The following circumstances are examples of a shareholder's reasonable expectations giving rise to a finding of oppressive or unfairly prejudicial conduct: (i) unequal repayment of shareholder loans to the preference of one shareholder, contrary to the shareholders' agreement (***Rooke v. Rodenbush***, [1993] B.C.J. No. 628 (S.C.)(Q.L.); (ii) exclusion of a shareholder from participation and management in a business, contrary to the arrangements which previously had existed between the principals (***Naneff v. Con-Crete Holdings Limited et al***, *supra;* (iii) treating a company as a sole proprietorship by failing to account for corporate funds in a timely manner, unauthorized use of corporate funds for personal expenses, and failure to obtain a shareholders' resolution on the principal's salary (***Brokx v. Tattoo Technology Inc.***, 2004 BCSC 1723; and, (iv) failure to follow the statutory requirements for corporate governance (***Burdeny v. K & D Gournet Baked Foods and Investments Inc.*** (1999), 48 B.L.R. (2d) 16 (S.C.)).
>
> [90] Examples of a court having determined that it would be "just and equitable" to grant relief under s. 227(3) from conduct that was unfairly prejudicial include: (i) the loss of confidence and inability to communicate with one another, where the termination of a minority shareholder's employment was inextricably interwoven with his position as an officer and director, and the business was in fact a partnership operated under the guise of a private company (***Mroz v. Shuttleworth*** (1996), 30 O.R. (3d) 205)(Ont. Ct. Gen. Div.); (ii) unequal repayment of shareholders loans and the failure to repay shareholders loans within a reasonable period of time (***Mroz,*** *supra*); and, (iii) exclusion of a shareholder from continued participation in the

management of a business, contrary to past practice (***Safarik,*** *supra* at ¶94-95.)

[55] The facts at bar clearly bring the plaintiff's case within the circumstances described in paragraphs 89 (ii), (iii) and (iv) (the failure to hold annual meetings on proper notice) and in paragraphs 90 (i), (ii) and (iii).

[56] I say this judging the defendant's conduct in respect of the plaintiff *qua* shareholder and not as a dismissed employee from the business.

[57] In all the circumstances, I conclude that the plaintiff is entitled to relief under ss. 227 and 324 of the ***BCA***.

V

[58] I would not order a winding up at this time. I am more inclined to make a ***Safarik*** type order so that the plaintiff has the opportunity to enjoy the full value of his shares in Millennium. Here, of course, I include the impact on their value by virtue of the company's ownership of the Property. In this regard, it would be unfair to the plaintiff to adopt as a valuation date, the date of the plaintiff's petition (19 November 2003). This would take from the plaintiff and unfairly reward the defendant with the increase in property values since that time. A much more contemporaneous valuation date will be used if it comes to that after the steps described below have been taken. [See in this regard ***Oakley v. McDougall*** (1987), 14 B.C.L.R. (2d) 128 (C.A.) and ***DeCotiis v. DeCotiis*** (1995), 56 A.C.W.S. (3d) 680 (S.C.).]

[59] It is not possible to order the purchase/sale of shares at this time because we do not have an accurate picture of the true value of the company, that is, one which includes any improper withdrawals from Millennium by the defendant (or indeed by the plaintiff).

[60] Nor do we have an accurate statement of the shareholder loan accounts in Millennium. Accordingly, I order an audit of Millennium's financial affairs since September 2002. The cost thereof shall be, in the first instance at least, at the company's expense.

[61] Upon completion of that audit, I will hear the parties' submissions on the return of capital or assets to the company by either of the parties. Thereafter, I will consider the ultimate remedy with particular attention to a ***Safarik*** type order.

[62] I of course will remain seized of the proceedings.

[63] With these initial findings, I hope that the parties can enter into meaningful settlement discussions in order to avoid the costs of further proceedings.

"Bauman J."